

LATHAM & WATKINS LLP
Manny A. Abascal (Bar No. 171301)
manny.abascal@lw.com
Kristen M. Tuey (Bar No. 252565)
kristen.tuey@lw.com
355 South Grand Avenue, Suite 100
Los Angeles, CA 90071-1560
Tel: (213) 485-1234
Fax: (213) 891-8763

LATHAM & WATKINS LLP
Michele D. Johnson (Bar No. 198298)
michele.johnson@lw.com
Andrew R. Gray (Bar No. 254594)
andrew.gray@lw.com
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626-1925
Tel: (714) 540-1235
Fax: (714) 755-8290

Attorneys for Defendant
Steven A. Sugarman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE BANC OF CALIFORNIA
SECURITIES LITIGATION

CASE NO. SACV 17-00118 AG (DFMx)
consolidated with
SACV 17-00138 AG (DFMx)

This Document Relates to:

ALL ACTIONS,

**DEFENDANT STEVEN A.
SUGARMAN'S NOTICE OF MOTION
AND MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
IMPROPERLY WITHHELD AS
PRIVILEGED**

**REDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL**

Judge: Honorable Douglas F. McCormick
Date: May 22, 2018
Time: 10:00 a.m.
Place: Courtroom 6B

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on May 22, 2018 at 1:30 p.m. or as soon
 3 thereafter as the matter may be heard, in the Courtroom of the Honorable Douglas
 4 F. McCormick, Courtroom 6B, United States District Court for the Central District
 5 of California, located at 411 West Fourth Street, Santa Ana, California, defendant
 6 Steven A. Sugarman will and hereby does move for an Order compelling the
 7 production of documents improperly withheld as privileged responsive to Mr.
 8 Sugarman's First Set of Production of Documents served on defendant Banc of
 9 California, Inc. and Subpoena to Produce Documents served on non-party Wilmer
 10 Cutler Pickering Hale and Dorr LLP ("WilmerHale").

11 This Motion is made following the conference of counsel required by Local
 12 Rule 37-1, which took place on February 26, 2018 and multiple dates thereafter,
 13 and is based on this Notice of Motion and Motion, the accompanying
 14 Memorandum of Points and Authorities, the Declaration of Kristen Tuey in
 15 support and exhibits thereto, the record in this matter, including the Court's order
 16 dated April 16, 2018 (ECF No. 189) setting the briefing schedule for this Motion,
 17 the arguments of counsel, and any other materials the Court may consider prior to
 18 its decision on this Motion.

19
 20 Dated: May 4, 2018

LATHAM & WATKINS LLP

21
 22 By: /s/ Manuel A. Abascal
 23 Manuel A. Abascal
 24 Attorneys for Defendant
 25 Steven A. Sugarman
 26
 27
 28

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I. INTRODUCTION

Mr. Sugarman seeks an Order compelling Banc of California, Inc. (“Banc”) and WilmerHale to disclose specific information currently being withheld under claim of attorney-client privilege and work product for the following reasons:

- No privilege attaches because the documents were never intended to be kept, and were not kept, confidential to WilmerHale’s client.
- The Special Committee waived any privilege or work product protections by its numerous detailed disclosures to third parties, including the SEC, courts, and the public.
- Banc and WilmerHale are selectively disclosing communications and findings of counsel to make certain arguments, while withholding communications on the same subject matter that would rebut these arguments. Case law prohibits litigants from misusing the privilege as a “sword” and “shield” in litigation as is being done here.

Resolution of this issue is essential to Mr. Sugarman’s defense. Mr. Sugarman resigned because the Special Committee members prohibited him from following up on allegations of their misconduct, retaliated against him, and scapegoated him to avoid scrutiny of their own conduct. Banc has taken a different position regarding Mr. Sugarman’s resignation, and has selectively produced privileged documents that it believes supports its narrative while withholding as privileged documents that support Mr. Sugarman’s position (which is true).

For example, Banc has produced some documents authored by Sanford Michelman, an attorney for Banc’s federal insured subsidiary, and described Mr. Michelman’s communications in public documents, while at the same time withholding as privileged other documents authored by Mr. Michelman relating to the same subject matter. The documents being withheld would show that Mr. Sugarman sought to follow up on SOX controls concerns and whistleblower allegations of misconduct – including misconduct by Special Committee directors.

1 The ones produced are being used by Banc (and now Plaintiff) to suggest Mr.
2 Sugarman did not cooperate with the Special Committee investigation. Indeed,
3 Banc is withholding a specific email string between Mr. Sugarman, Mr.
4 Michelman and others (which previously was provided to this Court *in camera*)
5 that conclusively shows Mr. Sugarman sought to resolve any claim of interference.

6 Similarly, Banc and WilmerHale have selectively disclosed WilmerHale's
7 findings that its client – the Special Committee – did nothing wrong. These
8 findings are contradicted by contemporaneous evidence, including information
9 being withheld as privileged, yet Banc and WilmerHale have refused to produce
10 any evidence supporting their self-serving findings. Banc and WilmerHale's
11 positions are scapegoating Mr. Sugarman and concealing the Special Committee
12 directors' misconduct. Similarly, the night before this Motion was due to be filed,
13 Banc attempted to "claw back" a document that had been produced months ago
14 and Mr. Sugarman believes will conclusively show he sought and obtained advice
15 of counsel in connection with his April 2016 biography. Banc only did so after
16 Mr. Sugarman informed it that he intended to exhibit the document in this Motion,
17 pursuant to Local Rule 79-5.2.2(b). While Banc has represented that it is assessing
18 its privilege claim, this late clawback illustrates Banc's strategic use of the
19 privilege as a sword and shield.

20 Banc also has caused to be redacted numerous documents that are essential
21 to Mr. Sugarman's defense, including audit documents explaining the "tone at the
22 top" and internal controls findings referenced in Plaintiff's Complaint. Banc has
23 not explained the basis for this redaction in any privilege log – in fact, it has not
24 produced any log at all. This alone is a basis for finding that the privilege cannot
25 be asserted. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct.*, 408 F.3d 1142,
26 1148 (9th Cir. 2005).

27 Mr. Sugarman requests that the Court enter a very specific order requiring
28 production of documents, prohibiting the assertion of privilege in depositions, and

1 providing a mechanism to ensure prompt enforcement of that order in order to
2 avoid any party taking a second bite at the apple as occurred in prior motions.

3 **II. BACKGROUND FACTS**

4 The underlying facts have been discussed in prior briefs (*e.g.*, Sugarman’s
5 Opening Br. Re: Omnibus Disc. Mot., ECF No. 114; Sugarman’s Mots. Compel
6 Prod. Docs. Benett and Karish, ECF Nos. 190, 191) and are summarized below
7 with emphasis on newly discovered evidence from recently produced documents.

8 **A. The Winston Investigation, Mr. Sugarman’s Biography, the**
9 **Anonymous Blog, and October 18 Press Release**

10 **1. Winston Investigation**

11 In October 2015, based on input from Mr. Sugarman and Banc director Chad
12 Brownstein, Banc’s Joint Compensation, Nominating, and Corporate Governance
13 Committee of the Board of Directors (“Governance Committee”) initiated an
14 investigation into Jason Galanis’ ties to the Banc, Messrs. Sugarman and
15 Brownstein, and others. The investigation was conducted by Winston & Strawn,
16 which previously had represented Banc, Mr. Sugarman, and entities associated
17 with Mr. Sugarman. Mr. Sugarman disclosed Winston’s prior representations in
18 writing to Banc’s General Counsel and asked that the General Counsel ensure the
19 Board was aware of these facts. (Decl. Tuey Supp. Sugarman Mot. Compel Prod.
20 Docs. (“Tuey Decl.”), Ex. C.) Mr. Sugarman believes the General Counsel may
21 deny this; in fact, [REDACTED]

22 [REDACTED] Banc falsely alleged in a public court filing that Mr. Sugarman did not fully
23 advise Banc of these facts. (*Id.* at Exs. D, E.)

24 Winston found no evidence of wrongdoing. Mr. Sugarman believes the
25 evidence will show Winston made multiple reports to the Governance Committee
26 between November 2015 and October 2016. (*Id.* at Ex. F.) WilmerHale later
27 concluded that these reports were not “regular” (*id.* at Ex. G), but this finding is
28 contradicted by contemporaneous emails and other evidence (*e.g.*, *id.* at Ex. F).

2. Mr. Sugarman's Biography in the 2016 Proxy Statement

In April 2016, while Winston's investigation was ongoing, Banc issued a Proxy Statement that included Mr. Sugarman's biography. Prior to Banc issuing the Proxy, Mr. Sugarman sent his biography to Banc's General Counsel and others. At the time of that correspondence, the General Counsel and Board were well aware of the Winston investigation and purported Galanis ties. (*E.g., id.* at Ex. H.) The Board later extended Mr. Sugarman's employment contract. (*Id.* at Ex. I.) Banc originally produced correspondence whereby Mr. Sugarman sent his biography to the General Counsel and others. Mr. Sugarman believes this and similar correspondence will conclusively establish that he lacked scienter with respect to any alleged omissions in his biography and relied in good faith on legal advice in connection with it. Last night, Banc for the first time asserted the attorney-client privilege over that correspondence, asked to claw it back, and demanded that Mr. Sugarman not file it in connection with this Motion.

3. The Anonymous Blog and Banc's Press Release

On October 18, 2016, an anonymous blogger published a report falsely stating that Galanis controlled Banc. In response, Banc put out a press release that described the Winston investigation. Banc and the Board initially were proud of the press release, but when others – including KPMG and the Securities and Exchange Commission ("SEC") – began to scrutinize the press release, the General Counsel, directors, and others began disassociating themselves from it.

B. The KPMG 10A Letter, WilmerHale Investigation and Failure To Establish An Attorney-Client Privilege Relationship

After the blog was posted, KPMG asked difficult questions of the General Counsel and Audit Committee Chair as to why they did not inform KPMG of the Winston investigation. Despite the General Counsel and others' efforts to persuade KPMG not to do so, KPMG issued a 10A letter demanding an investigation. (*Id.* at Ex. J.) None of the correspondence relating to the 10A letter

1 or the effort to prevent its issuance has been produced by KPMG, Banc or
2 WilmerHale. It is clear that members of the Governance Committee were
3 concerned about the scrutiny over their conduct and Mr. Sugarman believes they
4 altered documents to protect themselves. For example, [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] (*Id.* at Ex. K.)

8 Banc, the holding company, created a “Special Committee” comprised of
9 five directors – Halle Benett, Jeffrey Karish, Jonah Schnel, Robert Szniewajs and
10 Eric Holoman (until his resignation) – to investigate the blog allegations. The
11 Special Committee was *not* formed as a joint committee of the holding company
12 and its federally-insured subsidiary, Banc of California, N.A. (“Insured Bank”), but
13 rather existed only at the holding company level. The Special Committee hired
14 WilmerHale to conduct the investigation, thereby excluding Insured Bank and its
15 officers, directors, and attorneys from the attorney-client relationship between the
16 Special Committee and WilmerHale.

17 WilmerHale and Banc are refusing to produce almost all documents relating
18 to the Special Committee, including correspondence regarding its creation,
19 membership, and hiring of counsel, as well as the most basic corporate governance
20 documents such as Special Committee meeting minutes, resolutions, and votes.
21 Such documents clearly are not privileged, yet Banc and WilmerHale have not
22 produced them or put them on a detailed privilege log.

23 1. WilmerHale Was Conflicted and Not Independent

24 The Special Committee consisted of directors within the scope of the
25 investigation. Two of the Special Committee members, Messrs. Schnel and
26 Holoman, were on the Governance Committee that oversaw the Winston
27 investigation. (*E.g., id.* at Exs. F, K.) Another Special Committee member, Mr.
28 Karish, attended key Governance Committee meetings. Several Special

1 Committee members also had their own ties to Galanis according to the blog and
2 other evidence. (*E.g., id.* at Ex. L.) Finally, all of the Special Committee members
3 approved Banc’s October 18, 2016 press release, October 19, 2016 Form 8-K, and
4 retraction demand letter responding to the blog. WilmerHale interviewed its own
5 clients in the course of its investigation, further evidencing their status as
6 conflicted fact witnesses in the investigation. (*Id.* at Ex. M.)

7 The Special Committee’s lack of independence and conflicts of interest were
8 never disclosed to investors, and the Special Committee rejected Mr. Sugarman’s
9 concerns about their independence. (*See* Decl. Sugarman Supp. Opening Br. Re:
10 Omnibus Disc. Mot. ¶ 2, ECF No. 114-1.) Indeed, Mr. Sugarman was advised that
11 the Special Committee was adverse to and investigating Insured Bank. Despite
12 these conflicts, WilmerHale and Banc reported to the public that WilmerHale had
13 “assessed the independence of the Special Committee members and concluded
14 they were independent and disinterested in the investigation they were
15 conducting.” (*E.g., Tuey* Decl. Ex. E at ¶ 32.) How WilmerHale came to that
16 conclusion and what factors it examined in conducting its “assessment” are
17 unknown, since WilmerHale and Banc have asserted privilege over all documents
18 relating to that assessment.

19 2. WilmerHale Did Not Structure Its Engagement to Be Privileged

20 a. WilmerHale Represented Only a Special Committee of
21 Banc, the Parent Holding Company

22 WilmerHale only represented a committee of the parent holding company’s
23 Board. It did not represent any entity of Insured Bank, Banc’s federally insured
24 subsidiary, which actually performed the actions being investigated and which by
25 law is required to have some independence from the parent holding company. *See,*
26 *e.g.,* 12 C.F.R. § 225.4(a). Insured Bank was represented by Michelman &
27 Robinson, which Mr. Sugarman believes warned WilmerHale, the Special
28 Committee, and Insured Bank’s Board that WilmerHale’s failure to represent

1 Insured Bank's Board or a committee thereof – coupled with WilmerHale's
2 statement that the Special Committee was “adverse” to Insured Bank – made the
3 investigation unprotected by any attorney-client privilege.

4 b. WilmerHale Investigated Jointly with KPMG

5 KPMG appears to have attended all witness interviews, had input into the
6 document review protocols established with witnesses (including Mr. Sugarman),
7 appears to have been included in communications with Banc and Insured Bank
8 employees, and may have been included on communications between WilmerHale
9 and its client, the Special Committee. (*E.g.*, Tuey Decl. Ex. N.) WilmerHale has
10 recognized KPMG's integral involvement in its investigation in filings by referring
11 to KPMG as a “functional employee” of Banc. (*See* WilmerHale Mem. Law Re:
12 Omnibus Disc. Mot. 12, ECF No. 111.) KPMG, however, was *not* working at
13 WilmerHale's direction to assist it in providing legal advice.

14 Rather, according to its own documents, KPMG acted as an independent
15 third party investigating to determine whether Banc had violated any laws. (Tuey
16 Decl. Ex. J (KPMG was conducting its own separate investigation “to determine
17 ... whether it is likely that an illegal act has occurred.”).) KPMG also stated in
18 writing that it was *not* within the Banc's attorney-client privilege: “[KPMG] will
19 not be subject to restrictions based on the assertion of attorney-client privilege in
20 those circumstances where we believe access to certain materials and information
21 is necessary for our purpose.” (*Id.*) **WilmerHale itself has acknowledged that**
22 **sharing privileged information with KPMG waives the privilege:** “The Special
23 Committee is empowered to waive attorney-client privilege ... in sharing
24 information with KPMG and the SEC as necessary, the Special Committee is
25 acting in the interest of the Company [Banc] and the [Insured] Bank.” (*Id.* at Ex. K
26 6; *see also id.* at Ex. P (“[W]e're ... keeping in mind that a fact-finder might
27 decide” KPMG's presence during interviews waives privilege).)
28

1 KPMG thus was not within the scope of the Special Committee's attorney-
2 client privilege. Nevertheless, WilmerHale and Banc have refused to produce the
3 majority of communications exchanged with and information disclosed to KPMG,
4 and have directed KPMG to redact significant portions of its audit documents,
5 including sections regarding facts alleged in Plaintiff's Amended Complaint and
6 considered relevant by this Court. (*Id.* at Exs. Q, R.) WilmerHale has produced a
7 handful of communications with KPMG, but has not produced a detailed privilege
8 log and has offered no explanation for the communications it is withholding or
9 redacting, how they differ from what has been produced, or even the volume of
10 such documents.

11 c. WilmerHale Investigated Jointly with Counsel for Banc's
12 Current and Former Chief Financial Officers

13 WilmerHale also conducted its investigation along with O'Melveny and
14 Myers, which served as personal counsel for Banc's Chief Financial Officer
15 Francisco Turner, as well as personal counsel for Banc's former Chief Financial
16 Officer James McKinney, who no longer was a Banc employee as of November
17 18, 2016. O'Melveny was present during interviews and was consulted regarding
18 investigative activity. (*E.g.* Tuey Decl. Ex. S.) WilmerHale has produced some
19 communications with O'Melveny, but has failed to explain what information and
20 documents it is withholding and continues to withhold documents even though
21 O'Melveny's participation in the investigation waives privilege.

22 d. WilmerHale Stated that Its Communications with
23 Witnesses Were Not Privileged

24 During its investigation, WilmerHale advised witnesses, including Mr.
25 Sugarman, that it believed communications with it were not protected by the
26 attorney-client privilege. WilmerHale has produced a subset of communications
27 with witnesses and their counsel, but has not produced a detailed privilege log
28 explaining what additional communications are being withheld or on what basis.

1 e. WilmerHale Disclosed to the SEC Communications with
2 Its Own Client, the Special Committee

3 The limited discovery produced to date reveals that WilmerHale contacted
4 the SEC within days of being retained in late October 2016, and maintained regular
5 contact with the SEC throughout the investigation. (*E.g.*, Tuey Decl. Exs. T-Z.)
6 On January 26, 2017, WilmerHale made a presentation to the SEC detailing its
7 investigative procedure and disclosing details of its preliminary investigative
8 findings. (*Id.* at Exs. Y, AA.) In February 2017, WilmerHale made a second
9 presentation to the SEC disclosing its final findings and the remedial measures
10 undertaken by Banc. (*Id.* at Exs. Z, BB.) WilmerHale also provided oral
11 “downloads” and “debriefs” of its interviews to the SEC, *including its interviews of*
12 *and communications with its own clients.* (*Id.* at Exs. M, CC, DD.) WilmerHale
13 nevertheless contends its communications with the Special Committee remain
14 privileged and its interview memoranda are protected by the work product
15 doctrine. WilmerHale has offered no justification for this position, nor has it
16 produced a detailed privilege log sufficient to evaluate the scope and basis for its
17 assertions of privilege and work product protections.

18 **C. Counsel for Insured Bank Raised Concerns about the Special**
19 **Committee, Including Its Failure to Protect the Privilege**

20 Sanford Michelman represented Insured Bank, Banc’s federally-insured
21 subsidiary. He is a director of the Federal Reserve Board of San Francisco and
22 familiar with banking regulations and practices. Mr. Michelman interacted with
23 WilmerHale regarding documents, privilege, and corporate governance issues (*see*
24 *id.* at Exs. EE, FF), and also was involved in efforts to enhance Insured Bank’s
25 control environment. Further, in late 2016, Mr. Michelman received a number of
26 whistleblower complaints and other allegations relating to Special Committee
27 directors and others.

Documents produced by Banc show that Mr. Michelman repeatedly raised concerns that WilmerHale represented only a committee of the holding company's Board and not a joint committee with Insured Bank's Board, thus making its work not privileged. (*Id.* at Ex. GG, 2.) Mr. Michelman requested that WilmerHale take steps to protect Insured Bank's attorney-client privilege, but WilmerHale refused to do so. (*Id.*) Mr. Michelman also raised his concerns that the Special Committee directors (who also were directors of Insured Bank) had potential conflicts of interest to the extent WilmerHale took the position that the Special Committee's investigation was adverse to Insured Bank. Shortly thereafter, the Special Committee and WilmerHale began accusing Mr. Sugarman of "not cooperating" with their investigation by purportedly "directing" Mr. Michelman to take these legal positions. (*Id.*)

Mr. Michelman documented some of his concerns in two strongly worded letters to WilmerHale, which WilmerHale, at Banc's direction, has selectively produced presumably to illustrate Mr. Sugarman's alleged "non-cooperation." (*Id.*; *id.* at Ex. HH.) Banc and WilmerHale, however, have withheld evidence that would conclusively show Mr. Sugarman did not direct Mr. Michelman to interfere with WilmerHale, including communications with Mr. Michelman and others (some of which previously was provided to this Court *in camera*). Banc and WilmerHale also are withholding evidence corroborating Mr. Sugarman's reasons for resigning, including Mr. Michelman's documentation of potential misconduct by the Special Committee directors.

D. Banc and WilmerHale Waived Any Applicable Privileges by Selectively and Publicly Disclosing Details of the Investigation

Any potential privilege regarding WilmerHale or Mr. Michelman's work has been waived by Banc's numerous and selective disclosures.

1 1. Banc Issued Two Press Releases Selectively Disclosing
2 WilmerHale's Conclusions and Communications

3 Banc's January 23, 2017 press release regarding the WilmerHale
4 investigation stated as follows:

5 [WilmerHale's] inquiry has not found evidence that Jason Galanis
6 has any direct or indirect control or undue influence over the
7 Company. Furthermore, the inquiry has not found evidence
8 establishing that any loan, related party transaction, or any other
9 circumstance has impaired the independence of any director.

10 Through the inquiry, however, the Special Committee has
11 determined that a press release issued on October 18, 2016
12 contained inaccurate statements. In that press release, the Company
13 stated that the "Board of Directors, acting through its Disinterested
14 Directors" had, as of October 18, 2016, investigated issues raised
15 in the blog post. This press release was inaccurate in certain
16 respects. The review established that although an investigation had
17 been conducted, it was not initiated by the Board of Directors;
18 rather, it appears to have been directed by Company management
19 rather than any subset of independent directors. In addition, the
20 press release characterized the investigation as "independent"
21 without disclosing that the law firm conducting the investigation
22 had previously represented both the Company and the Company's
23 CEO individually. Furthermore, the press release stated that the
24 Board or a group of "Disinterested Directors" had received
25 "regular reports including related to regulatory and governmental
26 communications." This overstated both the degree to which the
27 Company had been in contact with regulatory agencies about the
28 subject matter referenced in the blog post, as well as the
involvement of the directors in oversight or direction of the
inquiry.

19 (*Id.* at Ex. G.) Banc's February 9, 2017 press release similarly selectively
20 disclosed WilmerHale's findings and communications, stating: "WilmerHale has
21 made a final report to the Special Committee and KPMG" confirming its earlier
22 conclusions. (*Id.* at Ex. II.) There is substantial evidence contradicting
23 WilmerHale's findings and communications, including evidence that was provided
24 to WilmerHale during its investigation. (*See id.* at Ex. F.) WilmerHale is refusing
25 to produce documents showing how it came to these "conclusions," or what
26 evidence it considered – or disregarded – when doing so.

27 Banc and WilmerHale's selective disclosures clearly seek to absolve
28 WilmerHale's client, the Special Committee directors, of any liability, and Plaintiff

(and Banc) now are using these findings in this litigation. Banc and WilmerHale have produced no documents supporting these self-serving conclusions, which were disclosed the same day Banc disclosed Mr. Sugarman's resignation and the SEC investigation in a transparent attempt to scapegoat Mr. Sugarman and protect the Special Committee directors from scrutiny.

2. Banc Selectively Disclosed Purportedly Privileged Communications

a. Banc Selectively Disclosed Mr. Michelman's Advice and WilmerHale's Findings in the Seabold Amended Answer

On January 11, 2018, Banc filed a proposed Amended Answer in a lawsuit filed against it by a former employee, Jeffrey Seabold (the "*Seabold* Amended Answer"). (*Id.* at Ex. E.) In that *Seabold* Amended Answer, Banc continued to disclose selectively and characterize WilmerHale's findings in a manner that disparaged Mr. Sugarman and protected the Special Committee members. Attached as Exhibit A to the Declaration of Kristen Tuey is a chart detailing the waivers in the *Seabold* Amended Answer and elsewhere.

Paragraph 42 of the *Seabold* Amended Answer gratuitously sets forth Banc's entire narrative with respect to Mr. Sugarman's resignation, including alleging that he was responsible for the initiation and oversight of the Winston investigation, the drafting of and purported inaccuracies in the October 18, 2016 press release, delays in the WilmerHale investigation, and the purported "interference" by Mr. Michelman. (*Id.* at Ex. E, 12:26-15:27.) Banc and WilmerHale have withheld the purported evidence (if any) of Mr. Sugarman "directing" Mr. Michelman and the basis for concluding Mr. Michelman's positions were "meritless." Indeed, Mr. Sugarman understands that those positions related to the appropriate responses to SOX controls concerns and whistleblower allegations of misconduct – the very same issues that the Special Committee refused to allow Mr. Sugarman to address, leading to his resignation. Banc is withholding as privileged communications that

1 corroborate Mr. Sugarman's reasons for resigning while at the same time
2 disclosing selected communications and information in furtherance of its attempt
3 to scapegoat him.

4 Banc prepared and leaked to the media the *Seabold* Amended Answer to
5 help manage a negative story published that same day by the Los Angeles Times –
6 there was no colorable legal basis for filing that document in court. (*Id.* at Ex. JJ.)
7 The *Seabold* Amended Answer contains numerous inaccuracies, from the mundane
8 (it states that the press release concerning WilmerHale's final conclusions was
9 issued on February 7 when it actually was issued on February 9) to the significant
10 (it falsely stated that Mr. Sugarman never informed the General Counsel or Board
11 that Winston previously had represented him). (*Compare id.* at Ex. E, 12:15-20,
12 *and id.* at Ex. E, 14:22-25, *with id.* at Ex. II, *and id.* at Ex. C.) Banc, however, has
13 provided no discovery regarding the *Seabold* Amended Answer, and neither Banc
14 nor WilmerHale have produced the purportedly privileged communications and
15 findings disclosed therein. Mr. Sugarman has the right to rebut these selective
16 disclosures with discovery that currently is being shielded by the privilege.

17 b. WilmerHale and Banc Have Selectively Produced
18 Certain Correspondence with Mr. Michelman

19 WilmerHale, after consulting with Banc, produced two of Mr. Michelman's
20 letters that illustrate Mr. Michelman's conflict with WilmerHale, as well as a
21 handful of additional emails with Mr. Michelman. Banc presumably disclosed
22 these communications to support its claim Mr. Sugarman interfered, but has
23 withheld documents showing the full and complete facts and context of these
24 communications. Mr. Sugarman is aware of many more withheld documents that
25 undermine Banc's narrative. For example, on December 28, 2016, Mr. Sugarman
26 in his individual capacity wrote an email to Mr. Michelman, Wachtell (counsel for
27 Banc and Insured Bank), and Latham (Mr. Sugarman's personal counsel), in an
28 attempt to resolve any dispute among counsel. (*See Decl. Sugarman Supp. Reply*

Br. Re: Omnibus Disc. Mot. ¶¶ 6-11.) That email is conclusive evidence that Mr. Sugarman did not intend to interfere with WilmerHale's investigation, but Banc continues to withhold this and other documents as privileged.

Further, Mr. Sugarman is aware that multiple whistleblowers informed Mr. Michelman of misconduct committed by Special Committee members and others. Mr. Sugarman believes Mr. Michelman compiled that information into a communication with Banc, but that document appears to have been withheld as privileged (without a privilege log we cannot be certain). Such evidence would strongly corroborate Mr. Sugarman's stated reasons for his resignation. Similarly, Mr. Sugarman believes his reasons for resigning and the true context of the conflict between Mr. Michelman and WilmerHale would be supported by additional correspondence, including between Mr. Michelman, Wachtell, Kasowitz Benson Torres LLP, and Banc employees.

E. The Selectively Withheld Documents Are Crucial to Mr. Sugarman's Defense

Plaintiff has stated in open court that it is relying on the *Seabold* Amended Answer and Banc's other disclosures in its case against Mr. Sugarman. In the February 13, 2018 Omnibus Hearing, Plaintiff and this Court noted that "whether or not he [Mr. Sugarman] was a[n] obstructionist with regard to the [S]pecial [C]ommittee" may support Plaintiff's claim that there were material omissions in his biography in the April 2016 Proxy. (*Id.* at Ex. KK, 10:9-11.) Plaintiff has explicitly stated that it intends to pursue this new theory, which is premised on Banc's selective disclosures. (*Id.*)

III. PROCEDURAL HISTORY AND MEET AND CONFER EFFORTS

Mr. Sugarman has exchanged correspondence, met in person multiple times, and had multiple telephonic conferences with both WilmerHale and Banc. Banc consistently has stated that it will not produce any documents responsive to Mr. Sugarman's Special Committee-related requests without a Court order or

1 agreement from WilmerHale. WilmerHale did not agree to produce a single
2 document until its Reply in support of the Omnibus Discovery Motion. Following
3 the hearing on that Motion, WilmerHale has made four productions, including one
4 yesterday. As of today, neither Banc nor WilmerHale has produced a detailed
5 privilege log regarding the documents being withheld.

6 WilmerHale has represented that its productions include (1) presentations to
7 the SEC and DOJ and documents provided to the SEC and DOJ; and (2) some
8 correspondence with certain third parties or their counsel, including KPMG, the
9 CFOs and Mr. Michelman. It appears WilmerHale is withholding other
10 communications with those third parties, although WilmerHale has not explained
11 in any detail what it has withheld or its basis for doing so. Furthermore, Banc,
12 WilmerHale, or both instructed KPMG to redact or withhold documents sought by
13 Mr. Sugarman. Mr. Sugarman has received no information as to the basis for the
14 redactions or the universe of withheld documents.

15 Prior the filing of this Motion, the parties discussed a compromise on
16 WilmerHale's work product – WilmerHale would produce interview memos if the
17 parties waived all requests for other work product. Mr. Sugarman asked for notes
18 of the interviews and other work product but this was rejected.

19 **IV. ARGUMENT**

20 “Courts construe privileges narrowly because the privilege hinders the courts
21 in the search for truth.” *United States v. Bergonzi*, 216 F.R.D. 487, 497 (N.D. Cal.
22 2003). The party asserting privilege bears the burden of supporting its assertion.
23 *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). WilmerHale and Banc
24 have not met that burden here.

25 **A. Parties Waive Any Privilege by Failing to Produce a Privilege Log**

26 A person who withholds information under an assertion of privilege or work
27 product must describe the nature of the materials not produced in a manner that
28 will enable other parties to assess the claim. Fed. R. Civ. P. 26(b)(5)(A); Fed. R.

1 Civ. P. 45(e)(2)(A). Six months after receiving document requests, Banc and
2 WilmerHale have not produced a detailed privilege log (although WilmerHale
3 produced a categorical log two days ago).

4 The failure to produce a privilege log under similar facts has resulted in a
5 waiver of the asserted privileged. For example, in *Burlington N. & Santa Fe Ry.*
6 *Co.*, 408 F.3d at 1148, the Ninth Circuit held that the failure to serve a privilege
7 log within five months of the discovery requests waived privilege. While the delay
8 was sufficient on its own, the Ninth Circuit further held that the producing party's
9 status as a sophisticated litigant, the fact that the documents at issue already had
10 been produced in a related matter, and the producing parties' evolving positions on
11 privilege further supported a waiver. *Id.* These factors compel the finding of
12 waiver on the similar facts here. As was recently held in *Wormuth v. Lammersville*
13 *Union Sch. Dist.*, 2017 WL 2505195, at *4 (E.D. Cal. Jun. 9, 2017), the failure to
14 produce a privilege log detailing the number of documents, subject matter, author,
15 recipient, and related information for documents withheld in the four months after
16 discovery responses were due results in waiver even under a forgiving calculation.

17 **B. WilmerHale Did Not Structure or Conduct Its Investigation in the**
18 **Manner Necessary to Establish Privilege**

19 It is undisputed that attorney-client privilege attaches only if a
20 communication was made in confidence with the intention of being maintained as
21 confidential. *Bergonzi*, 216 F.R.D. at 493. When documents are created with the
22 intent to relay the information to parties outside of the privilege, the
23 communications are not made in confidence and the privilege does not attach. *Id.*
24 at 493-494. Here, WilmerHale intended to share, and contemporaneously shared,
25 its investigation with KPMG, SEC, Banc, and Insured Bank – parties that were
26 outside the scope of the Special Committee's privilege. The intent to share and
27 sharing with each of these entities, alone, prevents the creation of any privilege.
28 Furthermore, Banc is asserting privilege over numerous communications that none

1 of the participants believed to be privileged, including communications between
2 Mr. Sugarman and Mr. Michelman, and Mr. Sugarman and Wachtell.

3 1. WilmerHale Included KPMG in Its Investigation, and KPMG
4 Was Required to Conduct a Non-Privileged Investigation

5 WilmerHale's investigation began only after KPMG issued a letter under
6 Section 10A of the Securities Exchange Act to evaluate "whether it is likely that an
7 illegal act has occurred" at Banc. *See* 15 U.S.C. 78j-1. KPMG is the *independent*
8 auditor of Banc, and expressly stated that to fulfill its obligations it could not be
9 restricted by Banc's attorney-client privilege. WilmerHale acknowledged in
10 writing that KPMG's involvement defeated any privilege claim. (*See* Tuey Decl.
11 Exs. J, O, P.)

12 When an auditor has identified potential illegal acts and investigates to meet
13 its statutory obligation under Section 10A, no privilege exists and disclosure to
14 auditors is a waiver of privilege and work product. *See Middlesex Ret. Sys. v.*
15 *Quest Software, Inc.*, 2009 WL 1067394, at *6 (C.D. Cal. July 8, 2009) (disclosure
16 to an independent auditor acting in a "public watchdog function" waives work
17 product protection); *see also U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065,
18 1071 (N.D. Cal. 2002) (no privilege when auditor has purpose independent of
19 securing legal advice); *Calvin Klein Trademark Tr. v. Wachner*, 198 F.R.D. 53,
20 54–55 (S.D.N.Y. 2000) (same). KPMG's issuance of a 10A letter places this case
21 in direct contrast to authorities previously cited by WilmerHale, where the auditor
22 received a presentation regarding an investigation in connection with a regular
23 audit. *See S.E.C. v. Roberts*, 254 F.R.D. 371 (N.D. Cal. 2008). Here, KPMG
24 issued a 10A letter because Banc and the Governance Committee had not informed
25 it of the prior investigation. It therefore took on an adversarial public watchdog
26 function, and did not share a common interest with the later-hired WilmerHale.

27 In an effort to keep documents from Mr. Sugarman, WilmerHale previously
28 argued that KPMG operated as a "functional employee" of Banc. That argument

1 only potentially applies if KPMG had been hired as a consultant to *WilmerHale* to
2 assist it in providing legal advice, as is the situation in the cases cited by
3 *WilmerHale*. See *Bensinger v. Denbury Res. Inc.*, 2012 WL 3062029 (E.D.N.Y.
4 Jul. 25, 2012) (no waiver when accountant hired by a law firm to provide
5 accounting services related to a merger). Here, that was not the engagement –
6 KPMG did not work for *WilmerHale*, but rather acted as Banc’s independent
7 auditor and investigated for itself whether there were any illegal acts at Banc.

8 2. WilmerHale’s Intent to Share Its Investigation with the SEC
9 Prevents the Attachment of Any Privilege

10 In *Bergonzi*, the investigating company and law firm made clear that they
11 intended to share a report of their investigations with the government. *Bergonzi*,
12 216 F.R.D. at 493. The investigative report, back-up materials, communications
13 between the law firm and company, and interview memoranda were held not to be
14 privileged or protected by the work product doctrine because there was no intent to
15 keep the investigation confidential. *Id.* at 498. Just as in *Bergonzi*, Banc publicly
16 admitted that it “intends to fully cooperate with the SEC” and that “the Special
17 Committee will share the results of its review with the SEC staff.” Indeed,
18 *WilmerHale* maintained frequent contact with the SEC from the outset and
19 “downloaded” the information it obtained directly to the SEC. (Tuey Decl. Exs.
20 M, DD.) No privilege can attach to *WilmerHale*’s investigation here. See *Ruehle*,
21 583 F.3d at 607 (no privilege where the intention of the investigation was to
22 disclose findings to external auditors and SEC).

23 3. WilmerHale Shared Its Work with Other Third Parties,
24 Defeating Any Claim of Privilege

25 The failure to follow a process that establishes and maintains privilege is
26 further demonstrated by *WilmerHale*’s sharing of the investigation with Banc and
27 the Governance Committee – the subjects of the investigation. We do not know
28 exactly what materials were shared with Banc because *WilmerHale* and Banc have

1 refused to produce a privilege log. But the minimal discovery produced to date
2 shows that counsel for one Banc executive and one former Banc executive – Mr.
3 Turner and Mr. McKinney, respectively – were involved in the investigation.
4 (Tuey Decl. Ex. S.) Similarly, Mr. Sugarman was told that his interview was not
5 privileged. Mr. Sugarman also understands that Banc’s General Counsel and
6 Board were updated on the investigation. Sharing the Special Committee’s
7 investigation with Banc representatives who were not on the Special Committee
8 waives any privilege. *Middlesex*, 2009 WL 10673943, at *4-*5 (special committee
9 waived privilege by sharing materials with company’s board or counsel); *In re OM*
10 *Sec. Litig.*, 226 F.R.D. 579, 593 (N.D. Ohio 2008) (audit committee waived
11 privilege by presenting finding to the full board); *see also, DeFrees v. Kirkland*,
12 2012 WL 1356495, at *1 (C.D. Cal. Apr. 11, 2012) (under California law,
13 privilege waived when committee’s investigative findings shared with full board).

14 Furthermore, all of the members of the Special Committee were interviewed
15 as fact witnesses in the investigation. (Tuey Decl. Ex. M.) There can be no
16 privilege when the investigation itself was shared with the subjects of the
17 investigation who were facing personal liability for the matters being investigated,
18 and then used by those same subjects to publish a narrative that affirmatively
19 attempts to relieve them of any responsibility.

20 **C. Any Privilege That May Have Existed Exist Has Been Waived**

21 Courts universally recognize that it is inherently unfair to permit an entity to
22 disclose certain “communications that support its position while simultaneously
23 concealing communications that do not.” *Bd. of Trustees of Leland Stanford*
24 *Junior Univ. v. Roche Molecular Sys., Inc.*, 237 F.R.D. 618, 625 (N.D. Cal. 2006).
25 Disclosure of work product materials results in a similar subject matter waiver.
26 *United States v. Hussain*, 2018 WL 1091083 (N.D. Cal. Feb. 28, 2018). Not only
27 has WilmerHale disclosed the documents relating to all aspects of their
28 investigation to KPMG, the SEC, Banc, and the public, but Banc has selectively

disclosed the aspects of the investigation that are favorable to its narrative in the *Seabold* Amended Answer – a document that has become Plaintiff’s theory of the case. In the *Seabold* Amended Answer, Banc:

- Asserts that WilmerHale “assessed the independence of the Special Committee members and concluded they were independent and disinterested in the investigation they were conducting.” (Tuey Decl. Ex. E ¶¶ 32, 34, 35.)
- Falsely claims that “there were no allegations in the Blog that any of the directors on the Special Committee had relations with Galanis.” (*Id.* at Ex. E ¶ 33.)
- Denies “that any members of the Special Committee were hiding, or had, any conflicts of interest that caused them to lack independence in connection with the investigation the Special Committee was conducting.” (*Id.* at Ex. E ¶ 34.)
- Asserts that Sugarman had “resisted and attempted to prevent the formation of the Special Committee,” “interfered with and delayed the Special Committee’s investigation,” “provided inaccurate information to the Special Committee’s lawyers,” “had directed an attorney, Sanford Michelman, ... to take a number of meritless positions,” “interfered with directors having direct communication with officers of the Company,” “ordered the issuance of the October 18, 2016 press release despite knowing of its inaccuracies,” and “knew that he had not informed the full board about any matters ‘relating to Galanis.’” (*Id.* at Ex. E ¶ 42.)
- Asserts that “Sugarman’s unacceptable personal and unprofessional conduct after the Blog was published and during the Special Committee’s investigation causes a majority of the directors to lose confidence in Mr. Sugarman’s ability to effectively lead the Company going forward.” (*Id.*)

D. Subject Matter Waiver Requires Production of All Documents Regarding WilmerHale’s Investigation

Case law is clear that once the privilege has been waived, all documents relating to the subject matter must be produced. *Roche Molecular Sys.*, 237 F.R.D. at 625. This “broad mandate” is justified by the need for fairness where a party discloses materials supporting its position while concealing materials that do not.

1 *Id.* To determine what constitutes the subject matter of a waiver, “courts weigh the
2 circumstances of the disclosure, the nature of the legal advice sought and the
3 prejudice to the parties of permitting or prohibiting further disclosures.” *Id.* When
4 parties disclose purported conclusions from a review or investigation, courts hold
5 that privilege and work product protections have been waived as to any matter
6 referenced in the disclosure. *See, e.g., Wadler v. Bio-Rad Labs*, 212 F. Supp. 3d
7 829, 851-52 (N.D. Cal. 2016) (disclosure of presentation resulted in waiver of
8 attorney-client privilege as to any referenced communications); *Hussain*, 2018 WL
9 1091083 (subject matter waiver upon disclosure of work product).

10 Here, Banc has addressed every aspect of the WilmerHale investigation in a
11 public assault on Mr. Sugarman. Banc makes claims regarding WilmerHale’s
12 assessment of the Special Committee members’ independence, WilmerHale’s
13 receipt of “accurate” information, WilmerHale’s interactions with Mr. Michelman
14 and officers of Banc, WilmerHale’s investigation of the parties’ knowledge with
15 respect to the October 18, 2016 press release, and the Special Committee’s reasons
16 for forcing Mr. Sugarman’s resignation, among other things. (*E.g.*, Tuey Decl. Ex.
17 E ¶ 42.) In order to fairly test these assertions, Mr. Sugarman is entitled to the
18 information being withheld that relates to these conclusions.

19 Banc also has waived privilege with regard to correspondence with Mr.
20 Michelman for reasons discussed *infra*. In addition, Banc waived privilege
21 regarding communications with counsel regarding the April 2016 biography as part
22 of its waiver regarding the Winston investigation, the Galanis matters, and the
23 production of documents in this case.

24 **E. WilmerHale’s Other Objections Are Flawed**

25 WilmerHale also objected based on relevance and burden. Its relevance
26 objection is flawed because WilmerHale admits its investigation was used by Banc
27 to attempt to force Mr. Sugarman’s resignation, thus putting the full scope of
28 WilmerHale’s investigation at issue. (Tuey Decl. Ex. E.) The Court already has

1 ruled that the reasons for Mr. Sugarman's resignation are within the scope of
2 appropriate discovery. (Order Re: Omnibus Disc. Mot. 2, ECF No. 146.) Burden
3 is not at issue because Banc surely is indemnifying WilmerHale, no evidence has
4 been provided regarding the volume of documents, and many documents likely
5 already have been produced to the SEC.

6 WilmerHale also argues that it need not produce documents because all of
7 the documents are within Banc's possession. This argument is factually incorrect
8 and in any event meritless – the availability of documents from other sources does
9 not relieve WilmerHale of its obligation to produce, especially because Banc too
10 has refused to produce. *See Compass North Indus. LLC v. Taylor*, 2014 U.S. Dist.
11 LEXIS 84192, *7 (D. Ariz. Jun. 19, 2014) (possibility that documents are
12 otherwise available does not make the subpoena improper); *Soto v. Castlerock*
13 *Farming & Transp., Inc.*, 282 F.R.D. 492, 505 (E.D. Cal. 2012) (allowing
14 discovery from third party because defendant would not produce the same
15 documents); *Kilopass Tech., Inc. v. Sidense Corp.*, 2011 U.S. Dist. LEXIS 65610,
16 at *8-11 (N.D. Cal. Jun. 21, 2011) (allowing discovery despite duplicative
17 requests).

18 **V. SPECIFIC RELIEF SOUGHT**

19 **A. The Court Should Order the Following Categories of Documents** 20 **to Be Produced**

21 Mr. Sugarman's proposed order seeks to prohibit any continued claim of
22 privilege over the subject matters described above, and for the production of the
23 following documents, unredacted, from WilmerHale and, where indicated by a *,
24 Banc.

25 Category 1: All documents provided or shown to any third party, including
26 without limitation the SEC, the Department of Justice ("DOJ"), KPMG, or counsel
27 for third parties, including collections of such documents and communications.

28 Category 2: All correspondence with and documents shared with KPMG.

1 Category 3: All memoranda, notes, or other documents memorializing
2 meetings with the SEC or DOJ.

3 Category 4: All memoranda, notes, or other documents memorializing any
4 interview conducted by WilmerHale, or where WilmerHale or Banc was present.

5 Category 5*: All communications with any member of the Special
6 Committee, including communications with and without third parties present.

7 Category 6: All documents relating to any evaluation of the independence
8 of the Special Committee directors, including communications and memoranda.

9 Category 7*: All documents relating to any public disclosure or public
10 statement, including the Banc's January 23 and February 9, 2017 press releases.

11 Category 8*: All communications with or copying Sanford Michelman.

12 Category 9*: All documents relating to the investigation of Mr. Sugarman's
13 transfer of Banc warrants to his brother, Jason Sugarman.

14 Category 10*: All communications regarding the Special Committee
15 including, its creation, membership, selection of counsel, and investigation.

16 Category 11*: All communications regarding the April 2016 biography.

17 **B. The Court Should Order Redacted Documents to Be Unredacted**

18 Banc has redacted materials from KPMG's and WilmerHale's small
19 productions to date, with no information to support their redactions. Banc failed to
20 establish any privilege over this matter by failing to produce a privilege log,
21 *Burlington N. & Santa Fe Ry.*, 408 F.3d at 1148, lacked any expectation of
22 confidentiality, *Bergonzi*, 216 F.R.D. at 493, and waived any privilege that did
23 exist upon disclosure to third parties, *Middlesex*, 2009 WL 10673943, at *4-*5, or
24 use in an assault against Mr. Sugarman, *Roche*, 237 F.R.D. at 625. There are 92
25 pages in 18 documents in KPMG and WilmerHale's limited productions that have
26 been improperly redacted. These should be produced in unredacted form.

27 A list of priority documents that should be produced or produced in
28 unredacted form is attached to the Declaration of Kristen Tuey as Exhibit B. Mr.

Sugarman requests a specific order requiring production of these documents in unredacted form immediately to allow him to fairly defend himself.

C. The Court Should Order that No Privilege Can Be Asserted in Depositions and Set Follow-Up Conferences to Enforce Its Order

As the parties begin scheduling depositions, Mr. Sugarman also seeks an order prohibiting Banc or Special Committee's counsel from instructing witnesses not to testify on topics for which this Court has made a ruling that the topic appropriate. Alternatively, he proposes that a Special Master be present during depositions to enforce this Court's ruling on privilege. None of the parties other than Mr. Sugarman have fully embraced the Court's Omnibus ruling, which has disadvantaged Mr. Sugarman. Mr. Sugarman expects Banc, WilmerHale, and members of Banc's Special Committee will continue to take a third or fourth bite at the apple by instructing witnesses not to testify based on scope, privilege, or other objections that have been resolved already absent strict orders from the Court. Mr. Sugarman also requests a process for follow up status conferences, if no Special Master is appointed, to submit additional specific document-by-document requests if parties do not comply with Court order.

It has been over five months since Mr. Sugarman served his document requests on Banc and his subpoena on WilmerHale. Only a handful of documents have been produced in response, depriving Mr. Sugarman of the opportunity to follow up with additional targeted requests. Banc and WilmerHale's purposeful delays have prejudiced Mr. Sugarman's ability to defend himself against Plaintiff's claims, and Mr. Sugarman reserves the right to seek an extension to the current case deadlines, including the fact discovery cut-off and all subsequent deadlines.

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VI. CONCLUSION

For the foregoing reasons, this Court should order that Banc and WilmerHale produce the documents described above.

Dated: May 4, 2018

LATHAM & WATKINS LLP

Manuel A. Abascal

By: /s/ Manuel A. Abascal

Manuel A. Abascal

Attorneys for Defendant, Steven A. Sugarman